**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**CIVIL REVN. APPLICATION NO. 1190 OF 2002**

Cormorant Investment Pvt. Ltd. ... Applicant

V/s

Sri Ram Business Pvt. Ltd. ... Respondent

**ALONGWITH**

**CIVIL REVN. APPLICATION NO. 1191 OF 2002**

Cormorant Investment Pvt. Ltd. ... Applicant

V/s

Ruia Fiscal Services Pvt. Ltd. ... Respondent

Mr. Navin Parekh with Mr. Haresh Mansukhani for the applicant (in both applications).

None present for respondent (in both applications).

**CORAM: A.M. KHANWILKAR, J.**

**DATED: 28TH JULY, 2006**

**ORAL JUDGMENT**:

1. Heard counsel for the applicants. None appears for the respondents though served.

2. Both these revision applications can be disposed of together by common judgment as the point involved in both matters is the same.

3. These revision applications take exception to the judgment and order passed by the Trial Court in allowing the Notice of Motion preferred by the respondent defendants thereby setting aside the ex-parte decree and restoring the suit to the file to its original number.

4. Briefly stated, the applicants filed two separate suits against the respondents in respective revision applications for possession of the suit property as described in the respective suits. The record indicates that, after following necessary procedure, the suit proceeded ex-parte and eventually ex-parte decree came to be passed on 4.8.2001. On 27.2.2002 the ex-parte decree came to be executed. It is the case of the respondent defendants that they were not served with the writ of summons before the ex-parte decree came to be passed. It is on the basis of this solitary ground the respondents moved two separate notice of motions in the respective suits for setting aside the ex-parte decree and for restoration of the said suits as also for further relief of restitution of the suit premises. The

Trial Court considered the entire material on record and has positively recorded finding of fact against the respondent defendants with regard to the specific stand that the suit summons was not duly served on them. Inspite of this finding, the lower Court proceeded to allow the notice of motion filed by the respondents by setting aside the ex-parte decree and restoring the suits to the file to its original number to be proceeded afresh in accordance with law. In so far as relief of restitution is concerned, the Court below has observed that the said relief will be considered alongwith the suits.

5. The grievance of the applicants in the present revision applications is that the lower Court having recorded positive finding of fact against the respondents, it was not right in exercising the discretion in favour of the respondents. As mentioned earlier, although the respondents are served, none appears.

6. The limited controversy that is required to be considered in these revision applications is, whether the approach of the lower Court in allowing the notice of motions filed by the respondents can be sustained

especially when it had clearly found as of fact that the stand taken by the respondent defendants that the suit summons was not duly served on them is unacceptable. The only reason that persuaded the lower Court to show indulgence to the respondent defendants is to give one opportunity to the defendants to contest the suits on merits.

7. After considering the submissions advanced by the advocate and the material on record, I have no hesitation in taking view that the lower Court has committed manifest error in allowing the notice of motion inspite of negating the claim of the respondents in relation to the specific ground for setting aside the ex-parte decree.

8. As is noted earlier, the only ground which was pressed by the respondent defendants for setting aside the ex-parte decree was that the suit summons was not duly served on them in the respective cases. So far as this stand is concerned, the analysis done by the Trial Court in paragraphs 25, 27 to 29, 33, 37 and 38 and the ultimate conclusion reached in para 39, I have no hesitation in upholding the same. In para 39, the Court has recorded as follows:

> **"Para 39:** In view of the above discussion I find that the defendants have failed to establish that in the above two suits writ of summons have not been duly served on the defendants."

There is no reason to doubt the correctness of this conclusion reached by the Court below on the merits. The findings so recorded by the lower Court has not been challenged by the respondents.

9. What is relevant to note is that, the Court below has recorded as of fact that the Court had called Bailiff's report and then after ascertaining the record, by order dated 18th December, 2000 ordered service upon the defendants under Order 5 Rule 20 of the Code of Civil Procedure and also by R.P.A.D. on the address of the suit premises. It is also noted that the Court also ordered service by R.P.A.D. at the registered address of the respondent Company at Calcutta. The Court has then noted that in one suit the respondents have been served on the suit address and in another suit the respondents have been served on the address of the Registered Office at Calcutta. Besides, what is

relevant to note is that, in para 38, the lower Court had adverted to the fact which clinches the issue. It is observed as follows:-

> **"Para 38:** In addition, the advocate for plaintiffs further pointed out the written endorsement made by the Registrar of this Court on docket of both the suits. On the docket of RAE Suit No. 929/1581 of 2000, the Registrar on 2.2.2000 endorsed that the plaintiffs and advocate absent. **JPS Thomas employee of defendants present.** On request, adjourned to 8.3.2000." (emphasis supplied).

As this fact has gone unchallenged and will have to be accepted as such, it necessarily follows that the respondents were duly served with the suit summons. This is the precise conclusion reached by the Court below as noted in para 39 of the impugned judgment. Notwithstanding that, the lower Court proceeded to show indulgence to the respondents by observing as follows:

> "However, it is matter of record that after service of summons by RPAD and pasting the defendants did not remain present after the first appearance by their representative on

2.2.2001 before the Registrar. Thus, the facts remained that when the suits were called for hearing on 14.6.2001 and 10.7.2001 when the evidence of P.W.No.1 were recorded. Then when the arguments of the advocate for plaintiffs heard on 17.7.2001 and when judgment and decree were passed on 4.8.2001, the defendants were absent. Because of absence of defendants for whatever may be the reasons they did not get opportunity to defend the suits on merits. I, therefore, consider it as sufficient cause for setting aside the ex-parte decree. It is apparent from the record that the defendants were negligent in not appearing on the dates of hearing of the suits. But at the same time I find it in the interest of justice to give one opportunity to the defendants to defend the suits. I find it just and proper and equitable to give one opportunity to the defendants to defend the suits on merits, not because the defendants are entitled the same as of right but for the reasons that justice can only be achieved if the defendants are allowed opportunity to disprove the suit claim and to prove their own

> case within reasonable time. Needless to say that decision on merits has more lasting effect. Whereas ex-parte decree carries with it a sense of dissatisfaction. So to leave out any dissatisfaction from the defendants I find it in the interest of justice to set aside ex-parte decree dated 4.8.2001 passed in both the suits."

10. This reasoning adopted by the lower Court would have been relevant if the case of the respondents was that they were misled by the advocate or by the form of notices which were served on them. Whereas, once it is found that the suit summons have been duly served on the respondents coupled with the finding recorded in paragraph 38 of the impugned judgment, that, in fact, some representative of respondents' appeared in the proceedings at one stage before the ex-parte decree came to be passed but failed to appear thereafter, the question of showing any indulgence to the respondents does not arise. The Court was obliged to test the stand of the respondents in the context of provisions of Order 9 Rule 13 as applicable in terms of the Bombay Amendment. Suffice it to observe that no indulgence could be shown to the defendants in the fact situation

of the present case as has been done by the lower Court.

11. Hence these revision applications succeed. The impugned judgment and order passed in the respective notice of motions are set aside. No order as to costs.

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